BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8002
File: 10-347841 Reg: 01051313

LABATT, USA, L.L.C.
27042 Towne Centre Dr., Suite 250, Foothill Ranch, CA 92610,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 13, 2003
San Francisco, CA

ISSUED JUNE 6, 2003

Labatt USA, L.L.C. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days[2] for having directly or indirectly furnished, given, or loaned money or other thing of value to Chevy's, Inc., and for having paid money to Chevy's, Inc., or its agent, for the privilege of placing an alcoholic beverage advertisement in a licensed premises, violations of Business and Professions Code sections 25500, subdivision (a)(2), and 25503, subdivision (h).

Appearances on appeal include appellant Labatt USA, L.L.C., appearing through its counsel Morton Siegel and Michael Moses, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant holds a beer and wine importer's general license. On August 17,

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[1] The decision of the Department, dated July 3, 2002, is set forth in the appendix.

[2] The Department's order suspended the license for 15 days for each of the two statutes violated, with the suspensions to run concurrently.

2001, the Department issued a four-count accusation against appellant alleging two instances of violation of section 25500, subdivision (a)(2) (section 25500 (a)(2), and two instances of violation of section 25503, subdivision (h) (section 25502(h)).

An administrative hearing was held on March 20 and 21, 2002, at which time oral and documentary evidence was received. At that hearing, testimony concerning the allegations of the accusation was presented by Andrew Timothy and Ronald Cortez, employees of appellant; Lori Jovovich, a Department investigator; Jennifer Miramontes, co-owner of A Change of Pace; and Bruce MacDiarmid and Isaac Gerstenzang, employees of Chevy's, Inc.

Appellant distributes Dos Equis beer to California retail licensees, including Chevy's, Inc. ("Chevy's"), an on-sale licensee that operates Chevy's Restaurants, a chain that specializes in serving Mexican-style food. For a number of years during the 1990's, Chevy's sponsored running events called "Chevy's Fresh Mex Runs" and water events called "Chevy's Fresh Mex Regattas." These events were conducted for Chevy's by A Change of Pace ("ACOP"), an events management and promotions company. Often, Chevy's employees assisted during the events, as did volunteers provided by local non-profit organizations. The non-profit organizations received cash by providing the volunteers.

Chevy's agreed to pay ACOP $10,000 per event to be the primary or "title" sponsor of these events. Chevy's also provided ACOP with a list of other potential sponsors for ACOP to solicit. Appellant, one of several alcoholic beverage suppliers on the list, was solicited by ACOP and agreed to pay ACOP $6,000 per race event to be a secondary sponsor. Appellant paid a total of $30,000 to ACOP in 1999, for sponsorship in five race events. The ALJ found that "the evidence shows that the sponsorship by

[appellant] of the 1999 Chevy's Fresh Mex Runs had as its intention the placement of Dos Equis advertising inside Chevy's stores." (Determination of Issues II-A.) Pursuant to appellant's agreement with ACOP, the Dos Equis logo, identifying appellant as one of the sponsors of the Chevy's Fresh Mex Races and Regattas, was included on the thousands of race entry fliers, the T-shirts worn by participants, the banners near the finish line, and other promotional materials and opportunities. There were various secondary sponsors, some of whom made in-kind contributions, but the participating alcoholic beverage companies provided only cash. Exhibit 12, an excerpt from a computer tabulation of ACOP sponsorship income for Chevy's events in 1998 and 1999, reveals that ACOP received $135,000 in 1998 and $119,000 in 1999 from concerns appearing to be suppliers of alcoholic beverages. According to that same exhibit, ACOP's total sponsorship receipts in 1998 were $165,540.06, and in 1999 were $154, 212.50.

The evidence did not establish that Chevy's actually paid $10,000 per event as called for in its agreement with ACOP. At least nine events were held in 1999,[3] which would have obligated Chevy's to pay ACOP $90,000, but there was evidence of only $34,104, at most,[4] being paid. Chevy's and ACOP asserted that Chevy's made in-kind payments to ACOP, but no records were kept documenting the monetary value of these contributions.

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[3] Exhibit 12 indicates bathtub regattas were held in Foster City and Folsom, and fun runs in Chico, Del Mar, Phoenix, Pleasanton, Portland, Sacramento, and San Jose.

[4] The evidence presented showed that Chevy's paid ACOP $6,000 for each of two September events and made an additional sponsorship payment for 1999 of $15,000. A payment of $7,104 was also made, but it was not established that this was for a Chevy's Fresh Mex event.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been proven.

Appellant has filed a timely appeal, and raises the following issues: (1) the Department has not proceeded in the manner required by law; (2) the Department's findings are not supported by substantial evidence in light of the whole record; and (3) appellant's sponsorship is specifically authorized and sanctioned by Department rule 106(i)(2).

DISCUSSION

Appellant was charged with violating section 25500(a)(2), which provides that non-retail licensees shall not:

> Furnish, give, or lend money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

Specifically, count 1 of the accusation stated that on March 18, 1999, appellant, "by and through its officers, directors, agents or employees, did, directly or indirectly, furnish, give, or lend money or other thing of value, to wit: $12,000.00 to Chevy's Inc. ... in violation of Section 25500(a)(2)." Count 2, in similar language, charged a payment of $18,000 on September 9, 1999.

Appellant asserts that there is no evidence that it gave, furnished or loaned any money to Chevy's, directly or indirectly, as alleged in the accusation. It asserts further that the testimony of all the witnesses was that no payments were made to Chevy's; that appellant's sponsorship was not conditioned upon the privilege of placing ads on Chevy's premises; that Chevy's paid its own sponsorship fees; and that there is no evidence that Chevy's sponsorship fees were reduced or in any way supplemented

either as a condition of or as a result of appellant's participation as a sponsor. Appellant says that the Department abandoned the charges of the accusation and failed to focus on the requisite facts in relation to the actual charges, resulting in surprise, unfairness, and a denial of due process.

Appellant appears to be arguing that there is a variance between the pleading and the proof offered at the hearing. While such a variance can constitute error, where it does not actually surprise or mislead an appellant, there is no prejudice to appellant. (Code Civ. Proc., §469; see 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §1146, and cases cited therein; 9 Witkin, Cal. Procedure (4th ed.1997) Appeal, §421, and cases cited therein.) Even in the case of a substantial variance, if an objection is not raised at the hearing, it is waived and may not be raised as an issue on appeal.

In this case, any variance that may have existed did not prejudice appellant or violate its right to due process. An administrative accusation is required to apprise a licensee sufficiently of the charges so that it is able to prepare its defense. (Gov. Code, §11503.) This accusation met that criterion as demonstrated by appellant's actions. Appellant showed no lack of preparation nor any surprise as to the evidence or arguments produced against it during the hearing, and does not appear to have sought a continuance to prepare for what it claims was unexpected.

The ALJ concluded that appellant was given fair notice:

> An overly literal reading of the Accusation will not save Respondent. Fair notice to Respondent of the violation alleged is more important than technical rules of pleading. Here the allegations in counts 1 and 2 of the Accusation are more than sufficient to put Respondent on notice of the violations found.

The hearing transcript contains an exchange between appellant's counsel and the ALJ that indicates that appellant's counsel well understood what the Department's

position was. Appellant argued that the Department was bound by the statements in the accusation, and the following transpired [RT 89-91]:

> Mr. Siegel: Your Honor, if I may, this is all well and good, but it has nothing to do with this case; and at some point, I would like counsel to deal at least with the basics of the specific allegations which are quite serious against my client.
>
> The Judge: Mr. Loehr, where are you going with this?
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> Mr. Loehr: Your honor, as you will note in the accusation, it talks about direct and indirect involvement in terms of money or things of value flowing from the supplier to the retail.
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> Mr. Siegel: I beg to differ, Your Honor. It talks about specific money –
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> The Judge: Just a minute. Let me hear Mr. Loehr.
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> Mr. Loehr: Thank you, sir. And the department wants to know – or what we're trying to find out is if there was any indirect flow of money and/or things of value associated with these arrangements.
>
> Now the department is entitled to delve into issues in particular that I think have been raised by their own – by Labatt's own witnesses that they had nothing to do with Chevy's. You know, this all – everything was going through A Change of Pace.
>
> And I think we're getting into an area where there is some indication that there was involvement between Labatt and Chevy's. It's important to get an overall picture of how these arrangements were structured.
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> Mr. Siegel: May I respond to that.
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> The Judge: Surely.
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> ...
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> Mr. Siegel: I think it's rather clear where the department would like to go with this case, but the fact of the matter is, different than many other allegations that they make about indirect benefits, this particular accusation is specific.
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> And my point is, having alleged a specific dollar amount directly connected to the checks, they are bound by their own statements in this accusation. Now, beyond that, they're locked out of their indirect argument here. They are saying we furnished $12,000 in Count I directly to Chevy's – 18,000 –
>
> The Judge: No, directly or indirectly.

Mr. Siegel: To Chevy's.

The Judge: Yes.

Mr. Siegel: Okay, I don't have any problem if we talk in terms of direct payments, because that's what they're alleging here.

The Judge: They also allege indirectly.

Mr. Siegel: Well, whatever that means.

The Judge: Okay.

Mr. Siegel: Whatever that means.

The Judge: All right.

Mr. Siegel: But my point is the predicate here is they have specifically identified a number. So the indirect theory in this case has to be tied to those specific figures rather than some maze of activity.

Appellant now says that it did not receive fair notice of the violation alleged, even though the record, part of which we have excerpted above, would suggest the contrary. Appellant cites two cases in support of its position: *McFaddin San Diego 1130, Inc. v. Stroh, et al.* (1989) 208 Cal.App.3d [257 Cal.Rptr. 8], and *Smith v. State Board of Pharmacy* (1995) 37 Cal.App.4th 229 [43 Cal.Rptr.2d 532].

McFaddin, supra, merely stands for the rule we referred to above when citing the Witkin treatise - that while the strict rules applicable in court proceedings do not apply in administrative proceedings, a respondent must nonetheless be informed of the substance of the charges and afforded appropriate elements of procedural due process, and when misled to his prejudice in maintaining a defense, a variance between pleading and proof may be deemed material. The licensee's defense in that case was premised on its having neither permitted nor even known of drug transactions, a defense the court found was in accord with its reading of the accusation.

In this case, it seems clear that Labatt was on notice of the Department's theory that something of value had been conveyed indirectly to Chevy's, measured in monetary terms. Labatt did not claim surprise, nor did it ask for a continuance to adjust its defense to what it now claims was a theory not communicated to it by the accusation. Indeed, Labatt seemed to dismiss the fact that the accusation was plead in the alternative -"did, directly or indirectly, furnish, give or lend money or other thing of value, to wit $18,000, to Chevy's, Inc. ..."

Smith v. State Board of Pharmacy, supra, involved wording in the accusation that the court found misled the respondent into believing that he needed to prepare a defense to a charge of personally dispensing medication, leaving him unprepared to contest the negligence issue which was argued. The case is not helpful to appellant.

The court in *California Beer Wholesalers Assn., Inc. v. Alcoholic Beverage Control Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96 Cal.Rptr. 297], reviewed the "tied-house" statutes, which were designed to prevent large manufacturers and wholesalers of alcoholic beverages from dominating local markets and engaging in "overly aggressive marketing techniques." The "tied-house" statutes established a "three-tier" system that prevented manufacturers, wholesalers, and retailers from becoming horizontally or vertically integrated.

We believe that section 25500(a)(2) must be construed so as to effectuate the legislative intent embodied in the prohibitions it encompasses, and to minimize the opportunity to evade that legislative intent by imaginative subterfuge.

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board /Deleuze* (2002) 100 Cal.App.4th 1066 [123 Cal.Rptr.2d 278] *(Deleuze)*,

the court considered the Department's interpretation and application of section 25502, subdivision (a)(2) (25502(a)(2)), which is the counterpart to 25500(a)(2), applicable to off-sale retailers. The Department there charged ZD Wines (ZD), a winegrower licensee, with "furnish[ing], giv[ing], or lend[ing] money or other thing of value, directly or indirectly," to Wally's, an off-sale general retail licensee. Wally's contracted with George Rice & Sons (Rice) to produce holiday gift catalogs, containing only products carried by Wally's, in 1995 and 1996. In each of those years, ZD paid Rice for wine advertisements in the Wally's catalogs, $650 in 1995 and $750 in 1996. Following the Board's reversal of the Department's decision suspending ZD's license, the appellate court reinstated the Department's decision, finding that ZD had contributed "a valuable and tangible benefit to Wally's by participating in paying for the production of its exclusive sales catalog . . . ." (*Deleuze*, *supra*, 100 Cal.App.4th at p. 1075.) The court found the Department's application of the statute to be "consistent with the legislative purpose of the tied-house laws, as articulated in the *California Beer Wholesaler* decision. . . . An ongoing relationship between a winegrower and a retailer such as that between ZD and Wally's could easily lead to the kind of influence of a supplier over a retailer the statutes were intended to prevent, for example, by causing the retailer to favor or 'push' the products of the wholesaler who chooses to pay for advertising in the retailer's catalog." (*Ibid*.)

While there are factual differences between *Deleuze* and the present case, the similarities are sufficient that we find *Deleuze* instructive. Section 25500(a)(2) is designed to prevent the same type of "ongoing relationship" between a manufacturer, appellant here, and an on-sale retailer, Chevy's, that could lead to Chevy's favoring the

products of appellant, who chooses to pay to sponsor and advertise in connection with a race designed to promote Chevy's. The fact that payment is made to a third party is irrelevant, since the benefit to Chevy's (support of the race that promotes Chevy's) and the possible evil (favoring appellant's products) still exists.

A decision may be supported by an inference, as long as the inference is a reasonable conclusion deduced from the evidence and not based on mere suspicion, conjecture or guesswork. (*Beck Development Co., Inc. v. Southern Pacific Transportation Company*, *supra,* at p. 1204; *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418 [9 Cal.Rptr. 10].) When the evidence raises an inference that a fact exists, the inference may be "rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities." (*Krause v. Apodaca*, *supra*, at p. 419.)

We do not agree with appellant that the benefits to Chevy's were merely speculative. Rather, the ALJ drew reasonable inferences based on the evidence in the record of what the various parties agreed to, were invoiced for, and actually paid. These inferences were not rebutted by clear, positive and uncontradicted evidence. While opinions might differ as to the inferences that could be drawn from the evidence, this Board is bound to sustain those that support the Department's decision.

We conclude that substantial evidence supports the Department's determination that appellant violated section 25500(a)(2).

II

Section 25503(h), prohibits a supplier from paying money or giving or furnishing anything of value for the privilege of placing or painting a sign or advertisement or window display, on or in any retail premises. Appellant contends that to prove such a

violation, the Department was required to prove that Labatt specifically intended that its payment was for the purpose of placing an advertisement in Chevy's premises. Further, appellant contends the payment must be made directly to the retail licensee - the statute would not reach an indirect payment through an agent - and even if the contrary were true, the Department failed to prove an agency relationship.

The ALJ resolved these issues in the following manner:

> Putting aside whether "specific intent" of the sort argued by Respondent is actually necessary to violate the prohibition in question, the evidence shows that the sponsorship by Respondent of the 1999 Chevy's Fresh Mex Runs had as its intention the placement of Dos Equis advertising inside Chevy's stores. The "equivocal testimony" of both Andrew Timothy and Ronald Cortez that they did not necessarily intend for Dos Equis beer thereby to be advertised in Chevy's premises and/or that they had no advance knowledge of such advertising is simply not credible.
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> First, Respondent has been sponsoring Chevy's Fresh Mex Runs for years prior to 1999, according to Cortez. Respondent therefore had experience with the same or similar events in the past and knew or should have known where the advertising was being placed. Second, both Timothy and Cortez knew that sponsorship entailed putting the Dos Equis logo on "all point-of-sale-materials." These materials included table tents, buttons, posters, easel boards, staff t-shirts and [raceflyer] entry forms." [sic] (Exhibits 3 and 4.) Where would these materials be placed? To what "sale" does "point-of-sale" refer? In context, the only meaning possible is Chevy's restaurants. It does not matter that some of the 35,000 or so race flyer /entry forms per event might also be placed in other retail establishments or mailed to past competitors, the vast majority of the "point-of-sale" materials were to be placed inside Chevy's restaurants. This intent is consistent with Timothy's testimony that one of the goals in his position with Respondent is "to reach a certain demographic to increase sale of product."
>
> Respondent suggests that Section 25503(h) cannot be violated by an "indirect" remittance since other subsections of Section 25503(h) prohibit "direct or indirect" dealings. Because those sections include a prohibition of "indirect" dealings and subsection (h) does not, no indirect remittance can violate the subsection. That contention fails.
>
> A careful reading of each of Section 25503's subsections that use the term "directly or indirectly" shows that they also specify a person or entity to whom the forbidden item must not be given. In subsection (a) possession of alcoholic beverages may not be given *to any on- or off-sale licensee*, directly or indirectly. In subsection (b) no alcoholic beverage may be given as free goods *to any*

licensee or any person, directly or indirectly. Subsections (d), (e) and (g) contain similar "direct or indirect" language, but also specify an individual or person to whom the prohibited item may not be given or paid.

In subsection (h), however, there is no mention of any recipient of the prohibited payment. Therefore, the "direct or indirect" language would be surplussage. Implicit in its terms, subsection (h) prohibits payment of money or the giving or furnishing of anything of value *to anyone* for the prohibited reason. Respondent's contention that no agency was shown between ACOP and Chevy's fails, since no such relationship is required. To comport strictly with the pleadings in counts 3 and 4, the conclusion reached in Determination I, above, that ACOP for the purpose of the 1999 Chevy's Fresh Mex Runs, was an alter ego of Chevy's is applicable here as well.

(Determination of Issues II-A and II-B. Italics in original.)

We are in agreement with his analysis and conclusions.

III

Rule 106(i)(2) (4 Cal. Code Regs. §106, subd. (i)(2)) provides that "suppliers may sponsor contests, races, tournaments, and other similar activities on or off licensed premises. Sponsorships shall be only in the form of monetary payments to bona fide amateur or professional organizations established for the encouragement and promotion of the activities involved." Sponsorship is also subject to several conditions, none of which are applicable here.

Appellant contends that its payments to ACOP to sponsor races complied with Department rule 106(i)(2). It argues:

There can be no credible dispute that ACOP was in fact a professional organization established for the promotion of the race, as that is its very business and has been so for some 15 years.

Per Jennifer Miramontes, co-owner of ACOP with her husband, ACOP, founded in 1987, is in the business of producing and promoting sporting events, including a 1998 cultural exchange event between runners in Japan and the USA, and advertises on the worldwide web. ACOP further promotes or markets the events by direct mail, store displays in store fronts and gyms, radio and television and whenever possible, direct mailings as well as websites. ACOP first began promoting and producing Chevy's Fresh Mex Runs in 1993, and has done so

ever since.

(App.Br., page 9; citations to record omitted.)

The ALJ obviously did not believe ACOP was the kind of organization within the meaning of the rule. He concluded (Determination of Issues, II-C) that “[w]ere the business activities of ACOP to qualify under the Rule 106(i)(2) exception, Rule 106(i)(2) would swallow Section 25503(h) in its entirety.”

It is unfortunate that the Department did not provide any kind of definition in the regulation for the term "bona fide amateur or professional organizations established for the encouragement and promotion of the activities involved."

The Department, in its brief, appears to interpret the phrase (at least for purposes of the present case) to mean an organization that promotes and encourages the sport of running, such as by developing training programs for runners, conducting clinics for runners, certifying high school running coaches, establishing programs to develop young runners for the Junior Olympics, or developing and promoting instructional materials or manuals for runners. In other words, the Department considers an organization qualifying under this rule to be one that is directly involved in developing and supporting a particular sport or group of sports or other (probably recreational) activity.

What the Department would not include is an organization that focuses principally on "promoting and marketing products and services." The Department characterizes ACOP as "Chevy’s ancillary marketing arm" that helped promote the races and regattas as a marketing vehicle for Chevy's and the other sponsors to increase consumer sales. It is not simply the "for-profit" status of ACOP that disqualifies it, according to the Department, but its primary focus on providing a venue

for marketing products and services.

The Department's rules must not alter or extend the scope of the statutes that the rules implement. If the Department rule is within the scope of its authority, the rules are reviewable for abuse of discretion. If the Department's interpretation is reasonable, it must be upheld, even if other interpretations would also be reasonable.

We find the Department's interpretation of rule 106(i)(2) to be reasonable. The rule refers to "amateur or professional organizations," which immediately brings to mind athletic organizations which promote particular sports or sports for particular age groups. Organizations of this type would generally be interested in "promotion" of the activity as an end in itself, not as a vehicle for commercial exploitation. Marketing of commercial items, particularly those unrelated to the activity, would be incidental to the activity itself.

In the present case, it would not have made any difference what the activity was that ACOP "promoted"; it happened to be primarily "fun run" races, but for ACOP's purposes, it could have been anything that would have generated sponsors to provide ACOP with income. The main purpose of the races put on by ACOP was to generate money for ACOP and the race sponsors, not for the activities of "fun runs" or "bathtub regattas."

Appellant did not comply with rule 106(i)(2).

ORDER

The decision of the Department is affirmed.[5]

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[5] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.